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No. 88-76

In The

Supreme Court of the United States

October Term, 1988

Crocker National Bank, Crocker Properties, Inc. and Pacific Gateway Associates Joint Venture,

Appellants,

v.

City and County of San Francisco,

Appellee.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS

JEROME B. FALK, JR.*
STEVEN L. MAYER
PETER J. BUSCH
HOWARD, RICE, NEMEROVSKI, CANADY, ROBERTSON & FALK
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: 415/434-1600
Attorneys for Appellee

LOUISE M. RENNE
City Attorney
GEORGE E. KRUEGER
Utilities General Counsel
BURK E. DELVENTHAL
Deputy City Attorney
City and County of San Francisco
City Hall, Room 206
San Francisco, California 94102
Of Counsel

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a development fee that requires developers of new office buildings to pay a portion of the cost of providing peak period public transit service, the need for which is generated by their developments, is constitutional under the Takings Clause.

2. Whether the Due Process Clause prohibits San Francisco from requiring Appellants to pay a development fee to cover the cost of providing peak period public transit services, the need for which is generated by Appellants' developments, when the building permits which Appellants received before enactment of the fee explicitly warned Appellants that their property would be subject to a "downtown assessment district or similar fair and appropriate mechanism" to provide funds for maintaining and augmenting public transportation service.

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Pursuant to Rule 16.1, Appellee City and County of San Francisco moves to dismiss the appeal filed by Crocker National Bank, Crocker Properties, Inc., and Pacific Gateway Associates Joint Venture on the ground that the federal issues presented are not substantial.

STATEMENT OF THE CASE

1. The Transit Impact Development Fee ("TIDF") Ordinance was enacted by the City and County of San Francisco ("City") in May 1981. It is designed to collect from developers of new office space in a defined area of downtown San Francisco an amount sufficient to defray the increased costs the City's public transit system will incur in providing the increased peak period transit service necessary to accommodate increased ridership resulting from the new office development during its lifetime, subject to a $5.00 per square foot cap. City and County San Francisco, Admin. Code. Vol. II ("ORD") (1988) §§ 38.3, 38.4 ("Jurisdictional Statement Appendix ("J.S. App.")) (110a-13a). In enacting the Ordinance, San Francisco was very much aware of the requirement that the fee advance a legitimate public purpose. Indeed, the legislation itself describes the fee's rationale:

> "New developments will bring increased need for public transit service in the downtown area during peak periods. The Municipal Railway will be burdened with the demands of transporting a larger number of passengers. Future increases in demand for public transit service are therefore attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods.
>
> This increased demand must be met not only by the acquisition of new rolling stock and the addition of new services, but also by the employment of additional personnel and fuel to operate the added facilities, and the maintenance, repair and replacement of the additional facilities as they wear out or become obsolete.
>
> That level of additional costs incurred by the City in expanding and operating, maintaining, repairing and replacing its public transit facilities to accommodate the additional peak-period person-trips generated by office use in new developments can be translated into a cost per gross square foot of office use in the new developments. The cost of expanding current services and adding new services

> is directly proportional to the amount of peak-period Municipal Railway travel generated by new development." (Ord. § 38.2 (J.S. App. 108a))

Indeed, to be absolutely certain that the fee could be used for no purpose other than advancing the specific public end of mitigating the adverse impact on peak-period public transit of new office development, the Ordinance required that "sums derived from the collection of the TIDF shall be held in trust" with the proceeds to

> "be used only for the provision of peak-period public transit service over and above public transit service being provided on March 1, 1980, to and from and within the downtown area, to compensate for and to defray the capital and operating costs incurred by the City in providing the benefit of public transit service in the downtown area in order to meet the special peak-period burden placed on the City by the addition of new office use in new developments in the downtown area of the City." (Ord. § 38.7 (as quoted in J.S. App. 117a))[1]

In setting the amount of the fee, the City's Board of Supervisors initially relied on a study prepared by a staff analyst, showing that it costs the City $9.18 to provide expanded peak period transit services for each new square foot of office space over the 45-year life of an office building.[2] The Board set the fee at a maximum of $5.00 per square foot, even though the staff report found that the actual burden on the City would greatly exceed this amount. Thereafter, the City hired Touche Ross & Company to conduct an independent evaluation of the

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1. This limitation on the use of the Transit Fee, which is not even mentioned in Appellants' Jurisdictional Statement, removes any incentive for collecting more than the cost of services to be provided. It also prevents the City from using the TIDF's proceeds for its general revenue needs. Appellants' assertion that the TIDF amounts to "a forced contribution to general governmental revenues" (J.S. 16 n.13) is thus a distortion of the facts.

2. This report was later corrected to state a cost of $6.57 per square foot.

cost of providing transit service for additional peak-period passengers. This evaluation, which estimated the cost per square foot to be $8.60, was presented to the City's Board of Supervisors at a public hearing and approved by the Board.[3]

The City's adoption of the TIDF Ordinance did not come as a surprise to Appellants. As part of the process by which Appellants gained approval from the City to construct two new office developments in the City's downtown area, Appellants prepared Environmental Impact Reports ("EIRs") under the California Environmental Quality Act, California Public Resources Code §§ 21000 *et seq*. The draft EIRs revealed that the two office buildings would adversely impact San Francisco's Municipal Railway System by causing increased demand for public transportation within the downtown area. In response to that disclosure, and the resulting public criticism, Appellants added language to their respective draft EIRs committing them to participate in a transit funding mechanism if one were established by the City.[4] Moreover, the permits for both the Crocker building and the

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3. The Board subsequently approved a further refined Touche Ross report resulting in an $8.36 cost per square foot.

4. The Crocker Appellants added the following language to their draft EIR:

> " 'In recognition of the need for public transit services to meet peak demand generated by cumulative office development in the Downtown District, Crocker would consider shared participation in a downtown assessment district, or other such mechanism, to provide funds for mass transit, should such a mechanism be established.' "

Pacific added the following language to its draft EIR:

> "'The project sponsor recognizes the need for expanded transit services to meet the peak demand generated by cumulative office development in downtown San Francisco to which this project would add; therefore, the

(Continued on following page)

Pacific building contained language explicitly requiring the developer to " 'participate in a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service, should such a mechanism be established by the City.' " J.S. App. 3a.[5]

2. Two principal cases were filed in the California Superior Court challenging the validity and application of the Ordinance.[6] The first (*Russ Building v. City & County of San Francisco*) was a class action dealing with the legality of the Ordinance on its face, while plaintiffs in the second (*Pacific Gateway/Crocker National Bank v. City & County of San Francisco*) challenged both the Ordinance's facial validity and its applicability to two specific buildings whose permits were issued prior to its enactment. In an effort to avoid a series of lengthy and expensive trials, San Francisco filed motions for summary judgment in both the *Russ Building* and *Pacific Gateway/Crocker* cases. Each of these motions contended, *inter alia*, that the Superior Court did not need to hold a trial on the plaintiffs' challenges to the Ordinance because the legislative record before the City's Board of Supervisors

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project sponsor will contribute to funds for maintaining and augmenting transit service, in an amount proportionate to the demand created by this project through a funding mechanism, such as a special assessment district, if such a mechanism is developed by the City.' " (J. S. App. 2a-3a n.1)

Although the California Supreme Court relied on this language in rejecting Appellants' Due Process claim (J.S. App. 2a-3a, 8a-9a), Appellants do not mention the draft EIRs in their Jurisdictional Statement.

5. The City's Planning Commission imposed a similar " 'transit mitigation condition' " on every other downtown office permit it approved in the latter half of 1979. J. S. App. 3a.

6. A few other cases were filed by individual developers opting out of the class action, but these cases had been held in abeyance pending the outcome of the two main cases.

established as a matter of law that San Francisco had a reasonable basis for adopting the TIDF. *See* Joint Appendix Ex. 8, 9. However, the trial court in both cases denied the City's motions in that regard, holding that the validity of the Ordinance presented triable issues of fact which could not be determined on motion for summary judgment. *See* Joint Appendix Ex. 18.

The Superior Court rejected Appellants' constitutional challenges to the Ordinance after holding not one, but two, trials. In the first trial, the court considered the issues common to the *Russ Building* and *Pacific Gateway/ Crocker* cases, and upheld the facial validity of the TIDF. This trial consumed forty-five trial days, during which the court heard from twenty-four witnesses and accepted 210 exhibits into evidence. The testimony and evidence introduced at trial covered every conceivable detail of the cost analyses relied upon by the City in enacting the TIDF. Not only did the City fully explain the basis for its cost calculations, but Appellants' opportunity to criticize the City's experts and to present their own experts' conclusions was virtually unlimited.

On the basis of this evidence, the Superior Court upheld the TIDF, in a lengthy opinion taking thirty-six printed pages in the Appendix to the Jurisdictional Statement. J.S. App. 70a-105a. Contrary to Appellants' claim, the Superior Court's constitutional inquiry did not begin and end with its conclusion that the Ordinance was " 'reasonably related to a legitimate government objective.' " J.S. 7. Instead, the Superior Court specifically acknowledged the need to determine "whether there is a sufficient nexus between the stated objective and the extraction of [the] TIDF fee." J.S. App. 78a. Indeed, the trial court specifically found this nexus to exist, because the Ordinance prohibited the use of TIDF funds "except to meet the increased demand for peak period-transit facilities created by new office development" and the evidence before the court indicated that "the need for additional public transportation [is] . . . directly related to the construction of new offices. . . ." J.S. App. 78a. Moreover, the Superior Court analyzed Appellants' methodological challenges to the amount of the fee in detail,

concluding that, with one immaterial exception,[7] the City had a rational basis for relying on the cost projections of its experts. J.S. App. 80a-101a. Based on this analysis, the Superior Court concluded that the TIDF "is *both* rationally based and reasonably related to the permissible legislative objective of mitigating the effects of the need for more public transportation generated by new downtown office development. . . ." J.S. App. 78a-79a. (emphasis in original).

After upholding the facial validity of the TIDF, the Superior Court then held a second trial and rejected Appellants' claim that the City was barred from applying the Ordinance to them. J.S. App. 56a-69a. In its decision, the trial court relied both on the transportation mitigation condition contained in Appellants' building permits and on extrinsic evidence offered by both Appellants and the City. This extrinsic evidence included, *inter alia*, a stipulation signed by Appellants stating that the transportation mitigation conditions included in their permits were imposed in response to the adverse environmental impact on transportation identified in the EIRs, prepared for their buildings. J.S. App. 63a-64a. Based on this stipulation, the extensive evidence offered by both sides, and its own analysis of the language in Appellants' building permits, the court found that the transit mitigation conditions contained within Appellants' building permits required them to comply with any financing mechanism "which would allocate to them the marginal cost of providing additional transit service to be generated by their

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7. The Superior Court concluded that there was no rational basis for including in the City's cost justification for the TIDF Ordinance the incremental cost for "policy driven cross-town lines", because there was no evidence that such lines would be likely to reach capacity over the forty-five year period of the TIDF. However, the Superior Court also found that this conclusion did not require it to invalidate the Ordinance because the City's incremental cost per square foot, even with the required adjustment, was still well above the $5.00 maximum. J.S. App. 87a.

proposed office projects." J.S. App. 67a. Because the TIDF was such a mechanism, the court concluded that application of the Ordinance to Appellants' projects did not violate their vested rights.

3. On appeal, the Court of Appeal consolidated the two cases and affirmed the trial court's finding that the TIDF is facially valid. Like the Superior Court, the Court of Appeal conducted a detailed review of the cost analysis used by the City in determining the amount of the TIDF. In the course of this review, the Court of Appeal concluded that the City's calculations had unfairly underestimated certain fare revenue received by the City (that derived from "fast pass" sales) and unfairly shifted to Appellants the burden of maintaining the existing degree of underutilization on certain "crosstown" and "feeder" routes which did not directly serve the downtown area in which Appellants' building are located. J.S. App. 49a-51a. With these two exceptions, however, the Court of Appeal found the Superior Court's conclusion that "the approach taken by the City's consultants was economically justifiable and financially and scientifically sound" to be supported by substantial evidence. J.S. App. 44a. Moreover, the Court of Appeal found that the two errors it had identified in the accounting methods used by the City to calculate the TIDF were harmless, inasmuch as the cost per square foot of the peak-period traffic generated by downtown development–even after taking into account the recalculations made necessary by the Court of Appeal's holding–was still well in excess of the $5.00/square foot fee imposed on Appellants. J.S. App. 49a-51a. The court therefore concluded that the TIDF was constitutional, because its analysis demonstrated that "the charge levied [by the Ordinance] is directly related and limited to the cost of increased municipal transportation services engendered by the particular development. . . ." J.S. App. 32a.

Although the Court of Appeal upheld the facial constitutionality of the TIDF, it also ruled that the Ordinance could not constitutionally be applied to Appellants. By a divided vote, the court held that otherwise relevant and

admissible evidence concerning the Planning Commission's intent in including the transit mitigation language in Appellants' building permits could not be considered unless it had been communicated to Appellants prior to enactment of the resolutions granting their permits. J.S. App. 41a. Accordingly, the court held that the only evidence which the trial court could consider on this issue consisted of the transit mitigation condition in Appellants' building permits and the language referring to mitigation of increased transit costs in the EIRs prepared in connection with Appellants' buildings. J.S. App. 41a-43a. Moreover, the court found that the language of both the building permits and the EIRs "was too general" to put Appellants on notice that their property might be subject to the TIDF. J.S. App. 43a. In dissent, Justice King took issue with both the majority's evidentiary ruling and its holding that Appellants' building permits and EIRs did not place them on notice that their property might be subject to the TIDF. The dissent stated, "there is nothing inequitable about requiring [Appellants] to pay a fee to provide revenue to offset the increased costs generated by new transit riders, since it was a condition of their building permit." J.S. App. 54a.

4. Following the Court of Appeal's decision, San Francisco filed a petition for review by the California Supreme Court in the *Pacific Gateway/Crocker* case, while a separate petition was filed by the plaintiffs in *Russ Building*. The court granted the City's petition, but denied the petition filed by the *Russ Building* plaintiffs. J.S. App. 23a. After full briefing and oral argument, the court held, by a vote of 6-1, that Appellants had no constitutional right to escape application of the TIDF. The court reached this conclusion for two reasons. First, it held that the transit mitigation condition in Appellants' building permits–which required them to participate "in a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service" (J.S. App. 3a.)–gave them adequate notice that "they would be required to pay some

amount to fund increased transit demands as a condition to developing their properties." J.S. App. 17a. While Appellants contended that this language did not encompass the TIDF because of differences between the Transit Fee and a traditional special assessment, the court rejected that argument, stating:

> "While the TIDF is not an assessment district, it is a 'similar fair and appropriate' transit funding mechanism. It is 'similar' because it shares many features with assessment districts and because it requires plaintiffs to pay the costs of the increased transit demand generated by their new office development; it is 'fair' because it was democratically enacted by the board of supervisors and applies without distinction to all new downtown office projects; and it is 'appropriate' because it serves the purposes contemplated by the transit mitigation condition." (J.S. App. 17a-18a)

Second, the court held that its reading of the transit mitigation conditions in Appellants' building permits was also supported by the "history and background" of those conditions. J.S. App. 13a. In support of this conclusion, the court cited statements by staff members of the City's Planning Department at the public hearing on the final EIRs for the Pacific projects which indicated that the transit mitigation condition language was intended to encompass the whole range of potential financing options which the City intended to consider (J.S. App. 13a-14a), and a Planning Commission resolution passed six and eight months, respectively, after the two Appellants received their building permits which referred to the prior imposition of transit mitigation conditions and endorsed a proposed transit impact fee. J.S. App. 14a-15a. Finally, the court rejected Appellants' contention that their subjective interpretation of the transit mitigation language contained in their building permits prevailed over extrinsic evidence of the City's legislative intent. J.S. App. 16a-17a. "To the extent [Appellants] relied on their own self-serving interpretation of the [transit mitigation] condition, such reliance must be considered unreasonable." J.S. App. 17a.

ARGUMENT

The constitutional issues presented in Appellants' Jurisdictional Statement are neither novel nor substantial. The Takings Clause does not prohibit local governments from requiring developers to pay a portion of the cost of providing the public services necessary to serve their developments. That is all the TIDF does. For this reason, it is not surprising that Appellants have pointed to no conflict between the decisions below and the decision of any other lower court, state or federal. *See* Part I(A), *infra*.

The only basis for Appellants' claim that this case involves a substantial issue of law is the conflict they assert exists between the decisions below and *Nollan v. California Coastal Commission*, ___ U.S. ___, 55 U.S.L.W. 5145 (June 26, 1987). However, no such conflict exists. Insofar as *Nollan* requires that there be a "nexus" between a condition imposed on development by a local government and the exercise of that government's police power, that requirement is plainly satisfied here, since it is undisputed that Appellants' buildings will increase the demand for peak period public transportation service and that the proceeds of the TIDF will be used only to help defray the cost of meeting that increased demand. *See* Part I(B), *infra*. Moreover, *Nollan* does not require courts to serve as the Supreme Board of Accountancy in reviewing a legislative determination as to the probable future cost of services for which a fee is charged. *See* Part I(C), *infra*.

Appellants' claim under the Due Process Clause is no more substantial. The City's decision to grant Appellants building permits subject to a transit mitigation condition requiring them to participate in future funding mechanisms designed to support public transportation was a legislative act. Consequently, the Due Process Clause requires only that the transit mitigation conditions not be unconstitutionally vague or the California Supreme Court's interpretation of those conditions not be unforeseeable. Appellants do not even contend that

either situation exists here. The Due Process cases relied on by Appellants, such as *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) do not apply to legislative acts, and are therefore irrelevant to this case.

Moreover, the issues presented by Appellants will only affect them, and no one else. Because the City has obtained a final judgment in the *Russ Building* case, a determination that the TIDF is unconstitutional would have no impact on the overwhelming majority of developers subject to the Ordinance.[8] Similarly, a favorable decision on the notice issue would affect only Appellants. This Court may therefore summarily dismiss the appeal without deciding novel issues of law or changing the rights of property owners and local governments as they now exist throughout the nation.

I.

THE TAKINGS CLAUSE DOES NOT PROHIBIT A CITY FROM REQUIRING DEVELOPERS TO PAY THE COST OF PROVIDING INCREMENTAL PUBLIC TRANSIT SERVICE GENERATED BY THEIR DEVELOPMENTS. ACCORDINGLY, APPELLANTS' CLAIM UNDER THE TAKINGS CLAUSE IS INSUBSTANTIAL.

A. The TIDF Is Constitutionally Indistinguishable From Subdivision Exactions And Other Forms of Land Use Regulation That Simply Compel Developers To Pay A Portion Of The Cost Of Providing The Public Amenities Necessary To Serve Their Developments.

The primary constitutional claim advanced in Appellants' Jurisdictional Statement is the contention that the

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8. The judgment against the *Russ Building* plaintiffs, who represented a class consisting of owners of property in the affected area of downtown San Francisco, became final when this Court dismissed their appeal on October 19, 1987.

TIDF violates the Takings Clause. J.S. 13-18. Yet Appellants' Takings Clause challenge to the TIDF has nothing in common with any Takings Clause claims this Court has upheld. First, Appellants' property has suffered no physical invasion, let alone the "permanent physical occupation" which this Court has found warrants especially stringent review under the Takings Clause. Compare *Nollan v. California Coastal Commission*, ___ U.S. ___, 55 U.S.L.W. 5145, 5146 (June 26, 1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982). Second, this case does not involve a "regulatory taking," as was alleged to exist in *Agins v. Tiburon*, 447 U.S. 255 (1980), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, *reh'g denied* 439 U.S. 883 (1978). Unlike the plaintiffs in those cases, Appellants here remain free to use their property in any way they see fit. Indeed, the TIDF does not deprive them of so much as a single "stick[] in the bundle of rights that are commonly characterized as property." *Nollan*, 55 U.S.L.W. at 5146. Third, unlike the plaintiffs in other Takings Clause cases, Appellants have never even attempted to demonstrate that the TIDF renders continued use of their buildings unprofitable, or otherwise deprives them of the economically valuable use of their property. *Compare Agins*, at 260; *Penn Central*, at 136.

Appellants therefore cannot show that the City has invaded their property, denied them the use of their land for any productive purpose, or defeated their reasonable, investment-backed expectations.[9] Instead, Appellants claim that the TIDF violates yet another principle of Takings Clause jurisprudence: that the Government may

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9. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-07 (1984). Because Appellants were aware of the permit conditions imposed on their developments (*see* Part II, *infra*), because those conditions are rationally related to a legitimate government interest, and because Appellants voluntarily accepted the permit conditions in exchange for the economic advantages of development, there was no interference with "a reasonable investment-backed expectation," and no taking occurred. *Id.* at 1006.

not force " 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " (J.S. 13, citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). As Justice Scalia recently observed, however, this principle does not prevent a State from requiring property developers to pay the cost of eliminating the adverse public impacts created by their developments:

> "Traditional land-use regulation . . . does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is . . . the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers . . . to dedicate certain areas to public streets[] are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." (*Pennell v. City of San Jose*, ___ U.S. ___, 56 U.S.L.W. 4168, 4173 (Feb. 24, 1988) (Scalia & O'Connor, JJ., dissenting))

Like the dedication requirements cited with approval by Justice Scalia in *Pennell*, the TIDF fits comfortably within "our constitutional traditions." Indeed, the Ordinance is constitutionally indistinguishable from the subdivision exactions described in Justice Scalia's opinion. Like these exactions, the TIDF simply compels property developers to pay part–not all–of the cost of providing the public services required by their developments.[10]

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10. Indeed, the only difference between the TIDF and the more commonplace subdivision exactions cited by Justice Scalia underscores the constitutionality of the former. Dedication requirements, and lot-size and set-back restrictions, impose the cost of providing public amenities such as open space and rights of way on a single developer. In contrast, the TIDF requires a class of 6,000 downtown property owners to pay the fee. J.S. App. 72a. This further supports its constitutionality. *Cf. Nollan*, 55 U.S.L.W. n.4 (Coastal Commission did

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The uncontradicted facts of this case demonstrate beyond doubt that the TIDF does nothing more than require Appellants to participate in remedying "the social problem" caused by their development of downtown office property. In enacting the TIDF, the City explicitly found that new office buildings within its downtown district will create an increased demand for public transit service during the peak period (*i.e.*, rush hour). Ordinance § 38.2; J.S. App. 108a, 126a. This finding was upheld by the state courts: the Superior Court specifically found that "the need for additional public transportation has been shown by the evidence to be directly related to the construction of new offices" (J.S. App. 78a), and this decision was affirmed by the appellate court (J.S. App. 34a-35a). Indeed, Appellants themselves recognized in the draft EIRs prepared for their projects that the cumulative effect of new office development in the San Francisco downtown area would create a "need for expanded transit services to meet the peak demand. . . ." J.S. App. 3a. Thus, it is undisputed that Appellants' office buildings–and the new buildings developed by other property owners similarly subject to the TIDF–will cause the City to buy more buses and pay more drivers to meet the increased demand for peak-period transportation which these office buildings will generate.

It similarly is undisputed that the TIDF's proceeds can only be used for the purpose of meeting these increased capital and operating expenses. The Ordinance explicitly requires TIDF funds to be "held in trust" by the City and used only to provide "peak-period public transit service . . . to and from and within the downtown area . . . " that did not exist before the TIDF's adoption.

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not require Nollan to bear entire burden of providing beach access); *Penn Central*, 438 U.S. at 134 (New York City Landmarks Law did not unconstitutionally impose an unfair burden on plaintiff, because it applied to over 400 individual landmarks).

Ordinance § 38.7; as quoted in J.S. App. 117a. Since Appellants do not assert that the City will violate this provision, the Court must assume that TIDF proceeds will only be used to defray the cost of public transportation services the need for which has been engendered by the developments of Appellants and those similarly situated.

These undisputed facts refute Appellants' Takings Clause claim. The TIDF does no more than require downtown office developers to pay the cost of providing the increased public transit service required to serve their developments. As such, it is unquestionably constitutional, and Appellants' claim under the Takings Clause should be summarily dismissed.

B. The TIDF Satisfies The "Nexus" Requirement Imposed By *Nollan v. California Coastal Commission*.

The same undisputed facts that render the TIDF constitutionally indistinguishable from traditional subdivision exactions also satisfy the "nexus" requirement imposed by *Nollan v. California Coastal Commission*, ___ U.S. ___, 55 U.S.L.W. 5145 (June 26, 1987). In *Nollan*, the Court invalidated a requirement imposed by the California Coastal Commission that a landowner grant the public easement across their beachfront property as a condition of rebuilding their house. While the Court held that the Commission could constitutionally have attached to the Nollans' building permit conditions that would have furthered a legitimate state interest related to the Nollans' rebuilding–such as height limits preventing the new house from blocking views of the beach–the Commission could not condition its approval on a requirement unrelated to the permit process. The Court made clear, however, that the State's power to regulate land use to further "a broad range of governmental purposes" (*id.* at 5147) does not violate the Takings Clause if the regulation "substantially advances legitimate state interests. . . ." *Id.* at 5147 (citation omitted). While the access

condition in *Nollan* failed to meet this test, the TIDF does meet it.[11]

In *Nollan*, the Court found that the "requirement that people already on the public beaches be able to walk across the Nollans' property" did not "help[] to remedy any additional congestion on [the beaches] caused by construction of the Nollans' new house." *Id.* at 5148. Precisely the opposite is true here. As we have seen, the San Francisco Board of Supervisors, the Superior Court, and the Court of Appeal have all found that new office buildings, including those owned by Appellants, will increase demand for peak period public transit services, which will in turn cause the City to incur additional expense. *See* p. 15, *supra*. Appellants have never disputed this finding, nor contended that the State's purpose in alleviating these increased transit costs is illegitimate. Nor can there be any question as to whether the TIDF substantially advances that purpose. Indeed, it has been precisely tailored to do just that, inasmuch as it has been calculated on the basis of the additional burden imposed on public transit services as a result of new office development, and the Ordinance itself prohibits expenditure of any of the proceeds for any purpose other than providing additional transit service to serve that expanded demand. Thus in this case, unlike *Nollan*, the condition which the

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11. Although the discussion which follows assumes *arguendo* that *Nollan*'s "substantiality" requirement applies to this case, there is one important difference between the condition imposed on the Nollans' property and the TIDF which should be noted. In *Nollan*, the condition which the Coastal Commission sought to impose amounted to a "permanent physical occupation" of the Nollans' property, which in the absence of a building permit condition would unquestionably have required the payment of Just Compensation. *Id.* at 5146. The TIDF, by contrast, does not invade Appellants' property at all, or interfere with their use of the property. *See* Part I(A), *supra*. However, because the TIDF easily passes muster under *Nollan*, the Court need not determine whether some lesser standard might be applicable.

State has imposed on the developers plainly "helps to remedy . . . additional congestion" caused by the developments. *Nollan*, 55 U.S.L.W. at 5148.[12]

Nor can Appellants claim that the state courts have failed to determine whether the nexus required by *Nollan* exists. To the contrary, the trial court made this precise finding, stating:

> "Since the objective of providing adequate public transportation is a legitimate governmental objective, this Court must determine whether there is a sufficient nexus between the stated objective and the abstraction of TIDF fee. The TIDF specifically states that the funds may not be used except to meet the increased demand for peak-period transit facilities created by new office development. (TIDF Section 38.7) Since the need for additional public transportation has been shown by the evidence to be directly related to the construction of new offices, there is a sufficient nexus." (J.S. App. 77a-78a)

The Court of Appeal was just as clear, holding that the TIDF "is directly related and limited to the costs of increased municipal transportation services engendered by the particular development. . . ." J.S. App. 32a. Thus, the *Nollan* requirement that the condition "substantially advance" a legitimate governmental purpose was plainly met in this case.

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12. *Nollan* also holds that if a state may deny a building permit altogether to serve a legitimate state interest, it may condition the development "upon some concession by the owner, even a concession of property rights, that serves the same end." *Id.* at 5147. Appellants do not deny that the City constitutionally could have denied them building permits on the ground that their proposed office buildings would unduly exacerbate the load on the City's public transit system. *See* J.S. 16 n.13. Under *Nollan*, it follows as a matter of course that the City may condition Appellants' building permits on the payment of a TIDF designed to further the same purpose of alleviating the increased demand on public transportation.

C. *Nollan* Does Not Require This Court To Second-Guess The City's Legislative Findings Supporting The Calculation Of The TIDF Or The State Court's Review Of Those Findings.

We have seen above, in Parts I(A) and (B), that the Takings Clause permits local government to require developers to pay part of the cost of providing the public services which their developments will require. Appellants therefore have no constitutional right to avoid paying *some* portion of providing the public transportation services which their buildings will require, over and above the portion that would ordinarily fall on them as taxpayers. Indeed, Appellants have expressly conceded as much, since each Appellant accepted a building permit conditioned on its participation "in a downtown assessment district or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service. . . ." *See* n. 4, *supra*. Thus, Appellants' claim under the Takings Clause boils down to this: that while the City may require them to pay *some* share of the cost of providing peak-period public transportation service to and from their buildings, the fee imposed by the Ordinance is too high.

Once properly understood, Appellants' constitutional challenge to the TIDF evaporates. Even Appellants concede that local government property assessments and user fees need not be "precisely tailored" to the burdens attributable to the subject property. J.S. 17. But this concession does not go nearly far enough. In the first place, while Appellants attack the TIDF on the ground that it exacts a fee only from a "relatively small class of individual new office developers" (J.S. 16), the fact that land use regulation "has a more severe impact on some landowners than on others . . . does not mean that the law

effects a 'taking.' " *Penn Central*, 438 U.S. at 133.[13] But more fundamentally, Appellants' argument ignores the Court's steadfast refusal to weigh the benefits and burdens imposed by local property assessments and user fees, unless a landowner can establish that the fee was "palpably arbitrary and a plain abuse." *Houck v. Little River Drainage District*, 239 U.S. 254, 262 (1915). Even during the hey-day of the Court's willingness to overturn economic legislation, the Court refused to invalidate local assessments unless a single property owner was being forced to pay the entire cost of a public improvement (*e.g., Norwood v. Baker*, 172 U.S. 269 (1898)), or unless the public improvement for which the assessment was levied conferred no benefit at all to the plaintiff. *E.g., Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478 (1916). Neither situation even remotely exists here. Instead, this case is one where any conflict as to the reasonableness of the TIDF must be resolved in the City's favor, since the City produced credible evidence that the Appellants will receive a benefit from the increased transit service to be financed by the TIDF. *See, e.g., Branson v. Bush*, 251 U.S. 182, 191-92 (1919).[14]

Appellants argue that this Court's recent decision in *Nollan v. California Coastal Commission* has significantly raised the standard by which the federal courts will review the legislature's determination of the amount of a particular assessment or user fee. J.S. 16-18. As we have seen, *Nollan* may require a *qualitative* demonstration that the TIDF "substantially advances legitimate state interests," a showing that is easily made in this case. *But see*

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13. The "relatively small class of individual new office developers" referred to in Appellants' Jurisdictional Statement in fact numbers approximately 6,000, the number of entities in the certified class in the *Russ Building* case. J.S. App. 72a.

14. Indeed, as long as the burden of an assessment is fairly distributed, a local government may impose an assessment that exceeds the estimated benefit produced by the improvements for which the assessment is intended to pay. *Roberts v. Richland Irrigation District*, 289 U.S. 71 (1933).

note 11, *supra*. But *Nollan* does not require the Court to engage in a *quantitative* review of the calculations behind the City's decision to levy a fee in the amount of $5.00 per square foot. Nothing in *Nollan*–or any other decision cited by Appellants–suggests that this or any other court must serve as a Supreme Board of Accountancy regarding the amount of a local assessment or development fee. To the contrary, *Nollan* makes clear that no such inquiry is necessary for purposes of Takings Clause analysis.

In *Nollan*, the Court held that the Coastal Commission would have been free to impose *any* condition which protected the public's ability to see the beach from the street as a condition of granting a building permit even if that condition constituted a permanent grant of continuous access to part of the Nollans' property. 55 U.S.L.W. at 5147. Yet *Nollan* did not suggest that, in order to exercise this power, the Commission had to measure the amount by which visual access to the beach had been impaired or limit the access for viewing purposes to that "quantity" which would exactly restore the impairment. As long as a development fee or assessment substantially advances a legitimate governmental purpose, the Takings Clause leaves the amount of the fee or assessment to the legislative process, subject to review under state law principles and standards by the state courts. Where, as in this case, the state courts determined that state law requires that the amount of the fee not exceed the cost of the services to be provided,[15] and the state courts explicitly found this condition to be satisfied, no purpose would be served by adding a level of federal review on

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15. *See* Cal. Gov't Code § 50076 (special tax–which requires a two-thirds vote of the electorate under Cal. Const. Art. XIIIA, § 4–does not include "any fee which does not exceed the reasonable cost of providing the service for which the fee is charged").

top of the scrutiny already given to the TIDF by the California courts.[16]

That is especially true where, as here, the state courts' review of the City's calculations supporting the TIDF was extensive. As noted above, the Superior Courts in both the *Russ Building* and the *Pacific Gateway/Crocker*

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16. This is consistent with the teaching of *Nollan*'s footnote 3. That footnote did not address the standard for reviewing a legislature's quantitative determination that setting a user fee at a particular level is necessary to compensate a public entity for the burden on public services imposed by a particular class of developments. Instead, it addressed the showing which a governmental agency must make in order to demonstrate that a condition imposed on development is appropriately related to the burdens it purports to alleviate. This latter issue, of course, is essentially one of law, and it may well be appropriate for the Court to insist on a closer "fit" between a condition and its purpose than that required under the Equal Protection Clause and/or substantive due process, at least where the condition requires what would otherwise be a compensable "taking." *See* note 11, *supra*. For this reason, a showing that the State "could rationally decide" that a particular development condition "might achieve the State's objective" (55 U.S.L.W. 5145) may be an insufficient basis on which to conclude that the condition will in fact "substantially advance" the desired purpose.

Once a court has determined that the required nexus between a development condition and its purpose has been shown, however, the need for such heightened judicial scrutiny disappears. In this case, for example, any requisite "fit" is shown by the uncontradicted evidence which demonstrates that Appellants' buildings will increase the demand for peak-period public transit service and the restriction in the TIDF Ordinance that its proceeds be used only for providing the incremental public transit service required by new downtown office development. *See* Part I(B), *supra*. Because of this restriction, the City has no incentive to increase the fee beyond the level necessary to pay for such incremental service. *See* note 1, *supra*. Thus, there is no reason why this Court should impose any greater standard than reasonableness when reviewing the actual calculation of the fee made by the legislature.

cases denied the City's motions for summary judgment, thus rejecting its claim that the record before the City's Board of Supervisors conclusively established the reasonableness of the TIDF as a matter of law. This review required the City to produce extensive evidence at trial in support of its decision to fix the TIDF at $5.00 per square foot. *See* p. 7, *supra*. As a result, the City was forced to defend the TIDF at a 45-day trial during which the Superior Court received expert testimony concerning every aspect of the City's calculations. On the basis of this evidence, the Superior Court upheld the TIDF, but only after rejecting one aspect of the City's calculations (*see* note 7, *supra*) and subjecting the others to detailed scrutiny. J.S. App. 80a-101a. Moreover, instead of stopping with its determinations that the City's calculation of the TIDF was reasonable, the Superior Court itself found that the "actual incremental cost" of providing new peak-period transit to the downtown office district is at least $7.55 per square foot of new office space, far in excess of the $5.00 per square foot TIDF. J.S. App. 99a.

The Court of Appeal's analysis of the TIDF was equally rigorous. The court refused to accept two separate aspects of the City's cost calculations because it found that these calculations had the effect of forcing Appellants to pay for service that primarily benefited the public at large. J.S. App. 49a-51a.[17] The Court accepted

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17. Appellants intimate that the state courts failed to acknowledge the TIDF's alleged shifting of the burden of providing public transportation service from the public at large to private parties. J.S. 15-16. In fact, however, the Court of Appeal expressly invalidated those aspects of the City's TIDF calculations which it found to require Appellants to pay for transportation service not directly connected to their new office buildings. Thus, when the Court of Appeal invalidated certain calculations made by the City's experts which in effect required Appellants to preserve existing load factors on certain routes, the court stated:

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the City's remaining calculations only after determining that they were supported by substantial evidence. J.S. App. 43a-51a. And the court went on to find that the TIDF "is directly related and limited to the cost of increased municipal transportation services engendered by the particular development. . . ." J.S. App. 32a.

The record in this case thus shows that the state courts have scrutinized the TIDF to ensure both that the Ordinance substantially advances a legitimate governmental purpose (*see* pp. 7, 8, *supra*) and that the projections used by the City in calculating the amount of the fee were reasonable. *Nollan* requires no more. Appellants' constitutional claim that the TIDF violates the Takings Clause is therefore insubstantial.

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"While it may be ideal transit policy to preserve the present load factors in the connecting routes, it is unfair to require plaintiff to bear this burden alone. While the population generated by plaintiff's buildings will likely increase the ridership on the 'feeder' and 'cross-town' routes, there is no evidence of increased costs to MUNI to operate these lines. This is the only relevant consideration, since the fee imposed by the City must not be more than needed to provide the improvements and services required by the development." (J.S. App. 50a)

Similarly, while Appellants argue throughout their Jurisdictional Statement that "the City has selected Appellants to bear the burden the rest of the community refused to assume" (e.g., J.S. 13) when it limited property taxes through the passage of Proposition 13, the Court of Appeal expressly found to the contrary. *See* J.S. App. 30a ("the transit fee imposed by the Ordinance is not intended to replace revenues lost as a result of [Proposition 13]").

II.

APPELLANTS' DUE PROCESS CLAIM IS INSUBSTANTIAL, BECAUSE THE DUE PROCESS REQUIREMENTS OF *MULLANE* AND ITS PROGENY DO NOT APPLY TO LEGISLATIVE ACTS SUCH AS THE GRANT OF APPELLANTS' BUILDING PERMITS.

In addition to their facial challenge to the validity of the TIDF, Appellants contend that the Ordinance may not constitutionally be applied to them, because the building permits they obtained for their projects did not give them adequate notice that their property might be subject to a transit development fee. This claim–which affects only Appellants–depends on a misreading of the California Supreme Court's opinion and a misapprehension concerning the applicable Due Process standards.

Appellants' building permits contained language requiring them to participate in "a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service. . . ." J.S. App. 2a. Relying on "familiar principles of statutory construction" (J.S. App. 7a), the California Supreme Court construed this language *without considering any extrinsic evidence* and concluded that the words "downtown assessment district, or similar fair and appropriate mechanism" encompassed the TIDF. J.S. App. 8a-12a. The California Supreme Court held that, under California law, the resolutions of the City Planning Commission approving Appellants' building permits have the status of state law (J.S. App. 7a n.8; *see also Terminal Plaza Corp. v. City and County of San Francisco*, 186 Cal. App. 3d 814, 825 n.7 (1986)). That construction of state law is, of course, binding on this Court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).[18]

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18. Appellants contend, in both the Questions Presented and the body of their Jurisdictional Statement, that the California Supreme Court did not even inquire "what a reasonable

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Of course, a state court's ability to construe a state statute is not unlimited. The Due Process Clause prevents a state court from adversely affecting the rights of litigants through "an unforeseeable judicial enlargement of [a] . . . statute." *See Marks v. United States*, 430 U.S. 188, 192 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Similarly, a statute may also be so vague as to give inadequate notice under the Due Process clause. *Connally v. General Construction Co.*, 269 U.S. 388, 391 (1926). But Appellants do not even attempt to demonstrate that the transit mitigation conditions incorporated within their building permits were unconstitutionally vague or that the California Supreme Court's interpretation of those conditions was unforeseeable.

Instead, Appellants rest their claim upon a quite different and inapplicable line of cases, which concern the Due Process requirements for notice in adjudicatory proceedings. Thus, Appellants contend that the transit mitigation conditions in their building permits failed to give them notice "of such nature as reasonably to convey the required information," citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). However, the Court has rejected the claim that *Mullane* and its progeny apply to legislative enactments:

> "The due process standards of *Mullane* apply to an 'adjudication' that is 'to be accorded finality.' The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law governing . . . property. It has long been established that 'laws [must] give the person of ordinary intelligence

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person might have understood by the language" contained in Appellants' building permits. J.S. 21; *see also* p.i. In fact, however, the California Supreme Court explicitly held that "[t]o the extent [Appellants] relied on their own self-serving interpretation of the [transit mitigation] condition, such reliance must be considered unreasonable." J.S. App. 17a.

> a reasonable opportunity to know what is prohibited, so that he may act accordingly,' but it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights." (*Texaco, Inc. v. Short*, 454 U.S. 516, 535-36 (1982) (citations omitted))

Moreover, the Court has also rejected any contention that the grant of a building permit, or other prospective change in land use, is an adjudicatory act to which the procedural requirements of Due Process such as notice and a hearing apply. In *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), the Court rejected a claim that land use decisions which affected only a single parcel of property could not be subjected to a referendum by the electorate. While the dissenting opinion cited state court decisions which had held that decisions approving new uses for property were adjudicatory in nature, and thus required the usual panoply of due process rights (*id.* at 684-85), the Court refused to disturb the Ohio Supreme Court's conclusion that the power to approve a new use for property is a legislative decision (*id.* at 673-74), and held that this legislative power could be shared with the electorate through the referendum process. "In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Id.* at 672. Thus, since the grant of Appellants' building permits was unquestionably a legislative act under both California law and *Eastlake*, the adjudicatory due process rules set forth in *Mullane* do not apply.

Texaco and *Eastlake* are by no means the only occasions on which this Court has refused to apply adjudicatory due process standards to the legislative process. Indeed, it has long been settled that the enactment of legislation does not require *any* notice whatever to affected persons. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915). Moreover, this Court only three years ago squarely rejected the contention–identical to that advanced here–that the government

has an obligation to provide individuals who may be affected by legislation with personalized notice regarding potential interpretations of that legislation and its possible application to them. *Atkins v. Parker*, 472 U.S. 115 (1985). In *Atkins*, the plaintiffs had received notice of a change in the method for calculating their food stamp entitlement and an invitation to request a hearing if they disagreed with the recomputation. They later complained, however, that the notice was inadequate because it did not advise them of the precise way in which each of their particular allotments of food stamps would be affected and did not give them sufficient information to make the recalculation themselves. In rejecting this argument, this Court invoked the principle that individuals are presumed to know the law whether or not it has actually been communicated to them and held:

> "As a matter of constitutional law there can be no doubt concerning the sufficiency of the notice describing the effect of the amendment in general terms. Surely Congress can presume that such a notice relative to a matter as important as a change in a household's food-stamp allotment would prompt an appropriate inquiry if it is not fully understood. *The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny.* To contend that this notice was constitutionally insufficient is to reject that premise." (*Id.* at 131 (emphasis added))

There is no doubt in this case but that Appellants received all the process that was due. Appellants were told of a change in law affecting them. They participated in the process through which that law was changed. They had actual knowledge of its terms. It was their responsibility to take adequate steps to inform themselves of the meaning of that change in law. Nothing in *Mullane* or any other procedural due process case required the City to spell out for Appellants in precise detail each and every "similar fair and appropriate [financing] mechanism" by

which the City might ultimately decide to fund the incremental public transit service necessitated by Appellants' projects.[19]

CONCLUSION

The appeal should be dismissed for want of a substantial federal question.

DATED: September 12, 1988.

JEROME B. FALK, JR.*
STEVEN L. MAYER
PETER J. BUSCH
HOWARD, RICE, NEMEROVSKI, CANADY, ROBERTSON & FALK
A Professional Corporation

LOUISE M. RENNE
City Attorney
GEORGE E. KRUEGER
Utilities General Counsel
BURK E. DELVENTHAL
Deputy City Attorney

Attorneys for Appellee
*Counsel of Record

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19. Appellants' claim of entitlement to adjudicatory due process rights is not enhanced by their contention that the legislation enacted by the Planning Commission granting their building permits gave them "vested rights" to complete their projects. J.S. 19-21. This bootstrap argument ignores the fact that Appellants had no "vested rights" to construct their buildings before the City granted them building permits. Whatever rights those permits granted, vested or otherwise, were no greater than the conditions imposed therein. Consequently, even assuming arguendo that legislative action which impairs already-existing "vested rights" might be subject to some higher degree of specificity, that conclusion would not aid Appellants.